IP 05-0175-M 1 F US v Marin
Magistrate Kennard P. Foster Signed on 5/9/05

NOT INTENDED FOR PUBLICATION IN PRINT

UNITED STATES OF AMERICA,	)	
	)	
Plaintiff,	)	
	)	
v.	)	
	)	CAUSE NO. IP 05-0175M-01
FRANCISCO MARIN, JR.,	)	
	)	
	)	
Defendant.	)	

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF INDIANA
INDIANAPOLIS DIVISION

UNITED STATES OF AMERICA,	)	
	)	
Plaintiff,	)	
	)	
v.	)	
	)	CAUSE NO. IP 05-0175M-01
FRANCISCO MARIN, JR.,	)	
	)	
	)	
Defendant.	)	

ENTRY AND ORDER OF DETENTION PENDING TRIAL

SUMMARY

The defendant is charged in a criminal complaint issued on April 29, 2005, with one count of conspiracy to possess with intent to distribute 100 kilograms or more of a mixture or substance containing a detectable amount of marijuana, a Schedule I Non Narcotic Controlled Substance, in violation of 21 U.S.C. §§ 841(a)(1) and 846. The government moved for detention pursuant to 18 U.S.C. §§ 3142(e), (f)(1)(C), and (f)(2)(A) on the grounds that the defendant is charged with a drug trafficking offense with the maximum term of imprisonment of ten years or more is prescribed in the Controlled Substances Act, and the defendant is a serious risks of flight, if released. The detention hearing was held on May 3, 2005. The United States appeared by Josh Minkler, Assistant United States Attorney. Mr. Marin appeared in person and by his appointed counsel, William H. Dazey, Jr., Assistant Federal Community Defender.

The government rested on the complaint and affidavit of the United States Drug Enforcement Special Agent Kevin W. Steele. Defense counsel did not cross-examine and submitted on the issue of probable cause. Based on the parties submission, the court found probable cause as to the charges in the complaint, and Mr. Marin was held to answer in the district court. The finding of probable cause as to the charges in the complaint gave rise to the presumptions that there is no condition or combination of conditions of release which will reasonably assure the safety of the community or that the defendant will not be a serious risk to flee if released.

The court admitted the Pretrial Services Reports (PS3), the complaint and affidavit of Special Agent Steele on the issue of detention. The evidence presented did not rebut the presumptions found in 18 U.S.C. § 3142(e) that the defendant is a serious risk of flight and a danger to the community. Furthermore, the totality of the evidence presented demonstrates clearly and convincingly that there is no condition or a combination of conditions of release which will reasonably assure the safety of the community, and that by a preponderance of the evidence that the defendant will be a serious risk of flight if released. Consequently, the defendant was ordered detained.

FINDINGS OF FACT AND CONCLUSIONS OF LAW

1. The defendant is charged in a criminal complaint issued on April 29, 2005, with one count of conspiracy to possess with intent to distribute 100 kilograms or more of a mixture or substance containing a detectable amount of marijuana, a Schedule I Non Narcotic Controlled Substance, in violation of 21 U.S.C. §§ 841(a)(1) and 846.

2. Based on the amount of marijuana alleged in the complaint, the penalty for conspiracy to possess with the intent to distribute 100 kilograms or more of marijuana, in violation of 21 U.S.C. §§ 841(a)(1), 846, 841(b), is a mandatory minimum sentence of 5 years and a maximum of 40 years imprisonment. Mr. Marin has one prior qualifying felony drug conviction. Should the government file the required notice the defendant would be subject to a mandatory minimum sentence of 10 years imprisonment and a maximum sentence of life imprisonment. 21 U.S.C. §§ 841(b) and 851.

3. The Court takes judicial notice of the complaint in this cause. The Court further incorporates the evidence admitted during the detention hearing, as if set forth here.

4. The government submitted the matter on the criminal complaint and the affidavit of Special Agent Steele. Special Agent Steele's affidavit demonstrated that the defendant was involved in an incipient conspiracy which involved approximately 1500 pounds of marijuana. Special Agent Steele had previously arrested Mr. Marin on April 18, 2002, after making a controlled delivery of 70 pounds of marijuana to Mr. Marin at his residence, 6440 Potomac Square Lane, Unit #3, Indianapolis, Indiana. Based on that arrest, on May 13, 2003, Mr. Marin was convicted of Dealing in Marijuana, a Class C Felony, in the Marion County, Indiana Superior Court. He received a 4-year suspended sentence and was placed on probation for 365 days. The PS3 discloses that Mr. Marin failed to appear or cooperate with Marion County, Indiana Probation Department in the preparation of his presentence investigation report. When asked why he didn't appear, Mr Marin informed the county probation officer assigned to the case that he had been in Mexico and Texas.

5. The Court finds that the complaint established probable cause for the offenses charged, and the rebuttable presumptions arise that the defendant is a serious risk of flight and danger to the community. 18 U.S.C. § 3142(e).

6. In the first instance, the evidence at the detention hearing did not rebut the presumptions found in 18 U.S.C. § 3142(e) that the defendant is a serious risk of flight and danger to the community. Furthermore, the totality of the evidence presented demonstrates clearly and convincingly that there is no condition or a combination of conditions of release which will reasonably assure the safety of the community, and that by a preponderance of the evidence that the defendant will be a serious risk of flight if released. Therefore, Francisco Marin, Jr., is ORDERED DETAINED.

7. When a motion for pretrial detention is made, the Court engages a two-step analysis: first, the judicial officer determines whether one of six conditions exists for considering a defendant for pretrial detention; second, after a hearing, the Court determines whether the standard for pretrial detention is met. *United States v. Friedman*, 837 F.2d 48, 49 (2nd Cir. 1988).

A defendant may be considered for pretrial detention in only six circumstances: when a case involves one of either four types of offenses or two types of risks. A defendant is eligible for detention upon motion by the United States in cases involving (1) a crime of violence, (2) an offense with a maximum punishment of life imprisonment or death, (3) specified drug offenses carrying a maximum term of imprisonment of ten years or more, or (4) any felony where the defendant has two or more federal convictions for the above offenses or state convictions for identical offenses, 18 U.S.C. § 3142(f)(1), or, upon motion by the United States or the Court *sua sponte*, in cases involving (5) a serious risk that the person will flee, or (6) a serious risk that the

defendant will obstruct or attempt to obstruct justice, or threaten, injure, or intimidate, a prospective witness or juror. *Id.*, § 3142(f)(2); *United States v. Sloan*, 820 F.Supp. 1133, 1135-36 (S.D. Ind. 1993). The existence of any of these six conditions triggers the detention hearing which is a prerequisite for an order of pretrial detention. 18 U.S.C. § 3142(e). The judicial officer determines the existence of these conditions by a preponderance of the evidence. *Friedman*, 837 F.2d at 49. *See United States v. DeBeir*, 16 F.Supp.2d 592, 595 (D. Md. 1998) (serious risk of flight); *United States v. Carter*, 996 F.Supp. 260, 265 (W.D. N.Y. 1998) (same). In this case, the United States moves for detention pursuant to §§ 3142(f)(1)(A) (C), and (f)(2)(A) and the Court has found these bases exist.

Once it is determined that a defendant qualifies under any of the six conditions of § 3142(f), the court may order a defendant detained before trial if the judicial officer finds that no condition or combination of conditions will reasonably assure the appearance of the person as required and the safety of any other person and the community. 18 U.S.C. § 3142(e). Detention may be based on a showing of either dangerousness or risk of flight; proof of both is not required. *United States v. Fortna*, 769 F.2d 243, 249 (5th Cir. 1985). With respect to reasonably assuring the appearance of the defendant, the United States bears the burden of proof by a preponderance of the evidence. *United States v. Portes*, 786 F.2d 758, 765 (7th Cir. 1985); *United States v. Himler*, 797 F.2d 156, 161 (3rd Cir. 1986); *United States v. Vortis*, 785 F.2d 327, 328-29 (D.C. Cir.), *cert. denied*, 479 U.S. 841, 107 S.Ct. 148, 93 L.Ed.2d 89 (1986); *Fortna*, 769 F.2d at 250; *United States v. Chimurenga*, 760 F.2d 400, 405-06 (2nd Cir. 1985); *United States v. Orta*, 760 F.2d 887, 891 & n. 20 (8th Cir. 1985); *United States v. Leibowitz*, 652 F.Supp. 591, 596 (N.D. Ind. 1987). With respect to reasonably assuring the safety of any other person and the community, the United States bears the burden of proving its allegations by clear

and convincing evidence. 18 U.S.C. § 3142(f); *United States v. Salerno*, 481 U.S. 739, 742, 107 S.Ct. 2095, 2099, 95 L.Ed.2d 697 (1987); *Portes*, 786 F.2d at 764; *Orta*, 760 F.2d at 891 & n. 18; *Leibowitz*, 652 F.Supp. at 596; *United States v. Knight*, 636 F.Supp. 1462, 1465 (S.D. Fla. 1986). Clear and convincing evidence is something more than a preponderance of the evidence but less than proof beyond a reasonable doubt. *Addington v. Texas*, 441 U.S. 418, 431-33, 99 S.Ct. 1804, 1812-13, 60 L.Ed.2d 323 (1979). The standard for pretrial detention is "reasonable assurance"; a court may not order pretrial detention because there is no condition or combination of conditions which would *guarantee* the defendant's appearance or the safety of the community. *Portes*, 786 F.2d at 764 n. 7; *Fortna*, 769 F.2d at 250; *Orta*, 760 F.2d at 891-92.

8. A rebuttable presumption that no condition or combination of conditions will reasonably assure the defendant's appearance or the safety of any other person and the community arises when the judicial officer finds that there is probable cause to believe that the defendant committed an offense under (1) the Controlled Substances Act, 21 U.S.C. § 801 *et seq.*; the Controlled Substances Import and Export Act, 21 U.S.C. § 951 *et seq.*, or the Maritime Drug Law Enforcement Act, 46 U.S.C. App. § 1901 *et seq.*, for which a maximum term of imprisonment of ten years is prescribed; (2) 18 U.S.C. § 924(c); (3) 18 U.S.C. § 956(a); or (4) 18 U.S.C. § 2332b. 18 U.S.C. § 3142(e).

This presumption creates a burden of production upon a defendant, not a burden of persuasion: the defendant must produce a basis for believing that he will appear as required and will not pose a danger to the community. Although most rebuttable presumptions disappear when any evidence is presented in opposition, a § 3142(e) presumption is not such a "bursting bubble". *Portes*, 786 F.2d at 765; *United States v. Jessup*, 757 F.2d 378, 383 (1st Cir. 1985). Therefore, when a defendant has rebutted a presumption by producing some evidence contrary to

it, a judge should still give weight to Congress' finding and direction that repeat offenders involved in crimes of violence or drug trafficking, as a general rule, pose special risks of flight and dangers to the community. *United States v. Dominguez*, 783 F.2d 702, 707 (7th Cir. 1986) (presumption of dangerousness); *United States v. Diaz*, 777 F.2d 1236, 1238 (7th Cir. 1985); *Jessup*, 757 F.2d at 383.

The Court has found the presumptions arise in this case. The evidence in the complaint, affidavit, and the PS3 did not rebut the presumption that the defendant is a serious risk of flight and a danger to the community.

10. Assuming *arguendo* the defendant had rebutted both of the presumptions, he would still be detained. The Court considers the evidence presented on the issue of release or detention weighed in accordance with the factors set forth in 18 U.S.C. § 3142(g) and the legal standards set forth above. Among the factors considered both on the issue of flight and dangerousness to the community are the defendant's character, physical and mental condition, family ties, employment, financial resources, length of residence in the community, community ties, past conduct, history relating to drug or alcohol abuse, criminal history, and record concerning appearances at court proceedings. 18 U.S.C. § 3142(g)(3)(A). The presence of community ties and related ties have been found to have no correlation with the issue of safety of the community. *United States v. Delker*, 757 F.2d 1390, 1396 (3rd Cir. 1985); S.Rep. No. 98-225, 98th Cong., 1st Sess. at 24, *reprinted in* 1984 U.S. Code Cong. & Admin. News 3182, 3207-08.

11. In this regard, the Court finds and concludes that the evidence in this case demonstrates the following:

a. This case charges the defendant based on an incipient conspiracy involving at least 1500 pounds of marijuana, an amount for redistribution. The origin of the

marijuana is, in all likelihood, Mexico, and the court notes the defendant has ties to Mexico, and traveled to that country when charged in a prior case. If the defendant fled to the Republic of Mexico in this case, the government of Mexico would not extradite the defendant because he could be charged with a crime carrying a potential sentence of life imprisonment.

b. The evidence demonstrates a strong probability of conviction.

c. The possible mandatory minimum sentence of ten years and maximum of life for the drug charge, when coupled with the fact that Mr. Marin traveled to and from Mexico while charged with a drug felony substantially increases the seriousness of his risk for flight.

d. The facts that the defendant committed the instant offense soon after a prior drug conviction, again involving a redistribution amount of marijuana (70 pounds) clearly and convincingly demonstrate the probable inability of any condition or combination of conditions of release to reasonably assure that he will not return to criminal activity or threaten the well-being of the community. 18 U.S.C. § 3142(g)(3) and (4).

e. In 2003, the defendant failed to follow the direction of county probation officers, and has not demonstrated why he would be a good candidate for pretrial supervision by U.S. probation officers.

f. The Court having weighed the evidence regarding the factors found in 18 U.S.C. § 3142(g), and based upon the totality of evidence set forth above, concludes that defendant has not rebutted the presumptions in favor of detention, and should be detained. Furthermore, he is, by the preponderance of the evidence, a serious risk of flight and clearly and convincingly a danger to the community.

WHEREFORE, Francisco Marin, Jr., is hereby committed to the custody of the Attorney General or his designated representative for confinement in a corrections facility separate, to the extent practicable, from persons awaiting or serving sentences or being held in custody pending appeal. They shall be afforded a reasonable opportunity for private consultation with defense counsel. Upon order of this Court or on request of an attorney for the government, the person in charge of the corrections facility shall deliver the defendants to the United States Marshal for the purpose of an appearance in connection with the Court proceeding.

Dated this _____ day of May, 2005.

Kennard P. Foster, Magistrate Judge
United States District Court

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